INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
Background	3
District Court Proceedings	4
Proceedings in the Court of Appeals	5
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	14
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	9a
APPENDIX D	13a
APPENDIX E	14a

CITATIONS

CASES:

Alexander v. *Gardner Denver Co.*, 415 U.S. 36, 94 S.Ct. 39 L.Ed.2d 147 (1974)	11
Allied Air Freight, Inc. v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968)	9
Archibald v. *Pan American World Airways, Inc.*, 460 F.2d 14 (19th Cir. 1972)	11
Bell v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)	6
Beryllium Corp. v. *United States*, 449 F.2d 362 (Ct.Cl. 1971)	10

Page

Binderup v. *Pathe Exchange*, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308 (1923) 7
Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952) 13
Civil Aeronautics Board v. *Aeromatic Travel Corp.*, 341 F.Supp. 271 (E.D.,N.Y. 1971) 10
Comprehensive Group Health Serv. Bd. of Dir. v. *Temple Univ.*, 363 F.Supp. 1069 (E.D., Pa. 1973) 10
Conley v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957) 13
Cunningham v. *Erie R.R. Co.*, 266 F.2d 411 (2d Cir. 1959) 12
Gallagher v. *Alitalia — Lines Aeree Italiane, S.P.A.*, 361 F.Supp. 1097 (S.D., N.Y. 1973) 11
Galveston H & S.A. Ry. Co. v. *Wallace*, 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1911) 9
Graham v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949) 13
Macklin v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C.Cir. 1973) 12
Mortimer v. *Delta Air Lines*, 302 F.Supp. 276 (N.D., Ill. 1969) 10
Nader v. *Allegheny Airlines, Inc.*, 365 F.Supp. 128 (D.D.C. 1973) 11
Southern Pilots Association v. *Civil Aeronautics Board*, 323 F.2d 288, 116 U.S.App.D.C. 283 (1963), cert.den. 376 U.S. 954 (1964) 11, 12
S.S.W. Inc. v. *Air Transport Association of America*, 191 F.2d 658 (D.C.Cir. 1951) cert.den. 343 U.S. 955, 72 S.Ct. 1049, 96 L.Ed. 1355 .....7, 8
Steele v. *Louisville & National R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) 13
Sundstrand Turbo v. *United States*, 389 F.2d 406 (Ct. Cl. 1968) 10
Tunstull v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944) 13
United States v. *Bilori Municipal School Dist.*, 219 F. Supp. 691, (S.D. Miss. 1963); aff'd 326 F.2d 237 (1963); cert.den. 379 U.S. 929 (1964) 9
Wills v. *United States*, 384 F.2d 943 (9th Cir. 1967).. 10

Page

STATUTES:

Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. 621, 626(b) (1967) 4, 7
Railway Labor Act, 45 U.S.C. 151, 156 and 152 seventh . 4, 7
Fair Labor Standards Act, 29 U.S.C. 217 2
Federal Aviation Act,
49 U.S.C. 1506 8
49 U.S.C. 1374(b) 10
28 U.S.C. 1331 5
28 U.S.C. 1337
Civil Rights Act of 1964, 42 U.S.C. 1981 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

W. PETER CAREY, et al, *Petitioners,*

v.

J. J. O'DONNELL, President of Air Line Pilots Association, et al, *Respondents*

GEORGE S. CHAUDOIN, et al, *Petitioners,*

v.

AIR LINE PILOTS ASSOCIATION, et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on August 19, 1974.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit has not been re-

ported, but is included as Appendix A. The initial rulings of the United States District Court for the District of Columbia also are not reported but are included as Appendix B and Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 19, 1974. By letter dated November 1, 1974 counsel was informed by the Clerk of that Court that there were insufficient votes for a rehearing *en banc*. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In *Carey, et al* v. *O'Donnell, et al,* jurisdiction of the Complaint was founded on the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. §§ 151, 156 and 152, seventh.

In *Chaudoin, et al* v. *Air Line Pilots Association,* jurisdiction of the Complaint was founded on the Age Discrimination in Employment Act, 81 Stat. 602 (1957), 29 U.S.C. 621, 623(2) and 626(c), and the Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U.S.C. § 217.

The pertinent statutory language is set forth in Appendix E.

QUESTION PRESENTED

Did the Court of Appeals err in holding that the District Court had no jurisdiction to these claims alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq. and the Railway Labor Act, 45 U.S.C. 151, et seq.?

STATEMENT OF THE CASE

Background

On May 19, 1972 the Civil Aeronautics Board approved a merger of Northeast Airlines and Delta Air Lines. The exclusive bargaining agent for both pilot groups was the Air Line Pilots Association, representing 540 Northeast pilots and 2,200 Delta pilots, which proceeded to effect its own internal procedures for integration of the two pilot seniority lists. A merged seniority list was proposed and immediately repudiated by the Northeast pilots. However, the president of the union refused to recognize the rejection of the list by the Northeast pilots.

The Northeast pilots filed a complaint in the United States District Court for the District of Columbia which sought to enjoin the execution of a collective bargaining agreement between the Air Line Pilots Association and Delta Air Lines which incorporated the seniority lists.[1]

The complaint for the injunction was denied and the Northeast pilots petitioned the Civil Aeronautics Board for the exercise of reserved jurisdiction under the original merger Order. The CAB however declined to exercise jurisdiction.[2]

---

[1] *Northeast Pilots MEC* v. *O'Donnell*, CA 1911-72. This judgment was not appealed.

[2] *Carey*, JA, pp. 26-32. The Order denying the petition stated in pertinent part: "As reiterated in past cases of a similar nature, we do not intend that our dismissal of the dissatisfied employees' petition should abridge their right to pursue such other remedies as may be available to them."

District Court Proceedings

On March 29, 1973, W. Peter Carey and four other plaintiffs instituted a class action on behalf of all former Northeast pilots in the District Court against the president of the Air Line Pilots Association and the union alleging invidious discrimination, breach of duty of fair representation in the negotiation of a collective bargaining agreement and violation of the Railway Labor Act (45 U.S.C. § 151, et seq.).

The defendants answered with a Motion to Dismiss, claiming, *inter alia,* that the court lacked jurisdiction over the subject matter.

On May 1, 1973 the District Court granted the Motion to Dismiss for lack of subject matter jurisdiction. The Order by the Court stated that ". . . exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board . . .". (Appendix B)

Plaintiffs filed a Motion for Reconsideration (*Carey,* JA, p. 89) which was denied by the District Court on May 29, 1973 (*Carey,* JA, p. 99). The Court did not grant a hearing on the Motion to Dismiss nor on the Motion for Reconsideration.

On April 19, 1973 George S. Chaudoin and three other former Northeast pilots instituted action against the Air Line Pilots Association and Delta Air Lines pursuant to the Age Discrimination in Employment Act (29 U.S.C. § 626(b)). This was a class action on behalf of all former Northeast pilots over the age of forty. Both defendants filed motions to dismiss and on June 15, 1973, without a hearing, the District Court dismissed the case relying on its prior dismissal in *Carey,* stating ". . . that exclusive jurisdiction over

the issue raised in connection with the seniority list lay with the CAB". (Appendix C)

Proceedings in the Court of Appeals

The plaintiffs noted an appeal from the dismissal in *Carey* on May 31, 1973 and in *Chaudoin* on July 2, 1973, both to the United States Court of Appeals for the District of Columbia Circuit. The Court affirmed the dismissal by the District Court in an Opinion dated August 19, 1974 (Appendix A, *infra*). The Opinion stated that "... the District Court has no jurisdiction over the actions below ..." (Appendix A, p. 7a)

A Suggestion for Rehearing en Banc was timely filed in both cases, but on November 1, 1974, counsel was informed that a majority of the Circuit judges was not in favor of a rehearing. (Appendix D)

REASONS FOR GRANTING THE WRIT

These cases were dismissed without a hearing on the basis that the District Court lacks jurisdiction. However, both complaints were founded on federal statutes and there was no dispute that the prerequisite jurisdictional amount was met. It is submitted that the dismissal of petitioners' actions by the District Court and the affirmance by the Court of Appeals was in total disregard of the absolute wording of the federal jurisdictional statute, 28 U.S.C. 1331(a), which states:

> "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, ... and arises under the Constitution, laws, or treaties of the United States."

In both *Carey* and *Chaudoin* the violation of a federal law is alleged, and in both cases the amount in

controversy exceeds $10,000. In such a situation the federal courts have no choice but to exercise jurisdiction over such matters. Federal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right. If his claim is bad, the judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not give the right the party claims, it is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction.

Various federal courts have made strong statements concerning the distinction between deciding a case on jurisdictional grounds as opposed to deciding a case on the merits. In *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, a plaintiff sued various F.B.I. agents, alleging damages when the agents imprisoned the plaintiff in violation of his fourth and fifth amendment rights. The agents argued that the plaintiff could not recover damages under either the Constitution or laws of the United States, since neither expressly provided for the recovery of money damages for the violation of constitutional rights. Both the district court and the court of appeals accepted the agents' argument and dismissed the case for lack of federal court jurisdiction. In reversing these holdings and granting the plaintiff federal court jurisdiction, the Supreme Court stated:

> "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause

> of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."

In the instant cases, the Railway Labor Act, 45 U.S.C. 151, et seq. and the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq., afford remedies to aggrieved persons and, as opposed to *Bell, supra,* a federal cause of action and a federal remedy are specifically stated.

The case of *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 303 (1923), also discussed the meaning of federal court jurisdiction, stating:

> "Jurisdiction is the power to decide a justiciable controversy . . . A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it." 263 U.S. 291, 303.

The petitioners here do not submit on the merits, but on the denial of a forum on a jurisdictional basis when the statutory right is clear. It is respectfully urged that unless this Court grants the petitioners their day in court, the usefulness of federal anti-discrimination statutes will be greatly diminished if their enforcement can be so easily subverted.

In *S.S.W. Inc.* v. *Air Transport Association of America,* 191 F.2d 658 (D.C.Cir. 1951), cert.den., 343

U.S. 955, 72 S.Ct. 1049, 96 L.Ed. 1355 (1952), plaintiffs alleged a combination in restraint of trade. The district court dismissed, holding that the alleged combination was subject to the primary jurisdiction of the Civil Aeronautics Board. The circuit court agreed that plaintiffs should have first sought relief from the CAB, but directed the district court to retain jurisdiction "while appellant seeks his remedies from the Board . . ." *id.* at 664. Thus, if the Board refused to act on any aspect of the plaintiff's request for relief, that refusal to act was not meant to bar the suit in district court. This holding was based primarily upon a provision of the Civil Aeronautics Act, 49 U.S.C. § 676, now recodified as 49 U.S. § 1506 (1963) of the Federal Aviation Act, that

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The court made it clear that remedies other than an appeal to the CAB could be invoked.

> "What we are saying is that the same set of facts may give rise to both a violation of the Civil Aeronautics Act and a violation of the antitrust laws. Although the second does not necessarily follow from the first but is bottomed upon its own statutory standards, the antitrust remedy of triple damages is not defeated by the fact that the Civil Aeronautics Act is also violated." 191 F.2d 658, 664.

In the instant cases, given the wording of 49 U.S.C.A. § 1506 and the holding in *S.S.W. Inc., supra,* the district court should certainly have jurisdiction to adjudicate the alleged violations of the two federal statutes.

Furthermore, the CAB, in refusing to exercise its "retained jurisdiction", did not attempt to preclude the plaintiffs from pursuing their remedies elsewhere. In fact, the CAB seemed to be going out of its way in suggesting that other remedies were indeed available to the plaintiffs. (Footnote 2, *supra*) Thus, as in *S.S.W. Inc., supra,* the Supreme Court should reverse and hold that the district court has jurisdiction to hear the plaintiffs' allegations of violations of the federal statutes that were not heard by the CAB. Accord, *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F.2d 441 (2d Cir. 1968).

In the instant case there is no "dual jurisdiction" between the CAB and the federal court concerning the petitioners' causes of aciton. Contrary to the defendant's assertions that the plaintiffs are contesting only the integration of the airlines' seniority list, so that the CAB would retain jurisdiction over the case, the plaintiffs are in fact alleging hostile discrimination and age discrimination on the part of the defendants. This involves much more than simply the integration of seniority lists since specific federal statutes have been violated, and as such the federal court is the only forum where the plaintiffs can enforce their rights.

The rule was well stated in *Galveston H.&S.A. Ry. Co.* v. *Wallace,* 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1911), that:

> "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." Id. at 490.

See also *United States* v. *Bilori Municipal School District,* 219 F.Supp. 691 (S.D.Miss. 1963), aff'd 326

F.2d 237 (1963), cert.den. 379 U.S. 929 (1964). Thus, given the authority of the above cases, it is submitted that the proper place for the enforcement of the Railway Labor Act and the Age Discrimination in Employment Act is not in the CAB but in the federal courts, as the statutes themselves specify. As stated in *Civil Aeronautics Board* v. *Aeromatic Travel Corp.*, 341 F.Supp. 271 (E.D., N.Y. 1971), questions designated as "law" questions must be determined by courts, rather than by agencies, so as to insure the uniform application and interpretation of statutes. Furthermore, where the particular issue involved deals with the enforcement of a federally-created right, and is not one addressed to a particular area of administrative expertise, the federal court, not the agency, should decide the legal issue. *Wills* v. *United States,* 384 F.2d 943 (9th Cir. 1967); *Comprehensive Group Health Serv. Bd. of Dir.* v. *Temple Univ.,* 363 F.Supp. 1069 (E.D. Pa. 1973). And even where an agency decides a question of law, it has been repeatedly held that a federal court is not bound by the agency's decision. *Beryllium Corp.* v. *United States,* 449 F.2d 362 (Ct. Cl. 1971); *Sundstrand Turbo* v. *United States,* 389 F.2d 406 (Ct. Cl. 1968).

In *Mortimer* v. *Delta Airlines,* 302 F.Supp. 276 (N.D. Ill. 1969), plaintiff sued in district court after being bumped from an oversold flight. Defendant moved to dismiss for lack of jurisdiction. The court, however, held that 28 U.S.C. § 1337 grants original jurisdiction to the district courts of "any civil action or proceeding arising under any act of Congress regulating commerce", citing the Federal Aviation Act.

In *Mortimer,* the statute upon which the plaintiff's cause of action was based was 49 U.S.C. 1374(b) and,

as here, the CAB has allegedly provided a remedy. However, in spite of this available remedy, the *Mortimer* court allowed a private civil suit. In the instant actions, petitioners' case for relief is much stronger than in *Mortimer*. Congress has already provided a specific civil remedy for both *Carey* and *Chaudoin*, i.e. the Railway Labor Act and the Age Discrimination in Employment Act. It would be manifest injustice to deny petitioners their statutory rights.

Mortimer has been followed in *Archibald* v. *Pan American World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972); *Gallagher* v. *Alitalia-Lines Aeree Italiane, S.P.A.*, 361 F.Supp. 1097 (S.D., N.Y. 1973); and *Nader* v. *Allegheny Airlines, Inc.*, 365 F.Supp. 128 (D.D.C. 1973).

This Court's recent decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. —, 39 L.Ed. 147 (1974) is also in point. The unanimous opinion held that an employee's right to a trial *de novo* under Title VII of the Civil Rights Act was not foreclosed by the prior submission of the claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement. The court stated:

> "Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination . . . in general, submission of a claim to one forum does not preclude a later submission to another." 415 U.S. at 43.

The decision in this case is directly contrary to the opinion of the D.C. Circuit in *Southern Pilots Association* v. *Civil Aeronautics Board*, 323 F.2d 288, 116 U.S.App.D.C. 283 (1963), cert.den. 376 U.S. 954 (1964).

The Court, in the instant case, states at page 7 of the slip opinion that "Our decision in *Southern Pilots Association* v. *CAB* is not to the contrary." It is respectfully submitted that this is incorrect. The following is the particular language in *Southern Pilots* which is contra to this case:

> "The Board, as it pointed out in its opinion denying petitinoners' application for rehearing and intervention, has no jurisdiction to pass upon designations of bargaining agents or charges of discrimination in the representation function." 323 F.2d at 290.

Yet the Court in this case stated that the ". . . District Court has no jurisdiction over the actions below . . ." Slip opinion. (Appendix A, p. 7a)

This decision is also contrary to *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (1973) which was also decided by the D.C. Circuit. This too was a senority dispute which had been arbitrated. Plaintiffs then filed a class action alleging discrimination under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 1981. The District Court dismissed for lack of jurisdiction. The Circuit Court reversed, holding that,

> ". . . it makes little sense to bar Macklin from judicial consideration of his claim of racial discrimination in circumstances where, as we pointed out, the grievance adjustment body not only was given no opportunity to adjudicate it, but also lacked power under the contract to act against racial discrimination." 478 F.2d at 991.

The identical jurisdictional issue was presented in *Cunningham* v. *Erie R.R. Co.*, 266 F.2d 411 (2nd Cir. 1959). An employee filed suit against the union and

the carrier contending that he had been discriminated against. The complaint was dismissed by the District Court with the view that the dispute should be heard before the National Railroad Adjustment Board. The Circuit Court reversed and held that "This dispute based upon alleged discrimination is between the employee and the union, not between either an employee or a union and the railroad . . ." 266 F.2d at 415.

The court further cited a "long line of Supreme Court cases . . ." in support of jurisdiction.[3] All of these cases "construed the Railway Labor Act as requiring union representation to be exercised without 'hostile discrimination' toward any one group". The Court further rejected the argument that jurisdiction was vested in the Adjustment Board.

Cunningham goes on to discuss why hostile discrimination cases, other than those based on race or color, must have a jurisdictional basis in the federal court, concluding that "as a matter of common sense, it does not seem rational to restrict 'hostile discrimination' to any one particular group of cases. Moreover, Cunningham is also claiming violations of the specific requirement of the Railway Labor Act . . ."

Similarly, petitioners here allege hostile discrimination and a specific violation of the Railway Labor Act. Either is sufficient to state a cause of action for jurisdiction by the district court.

---

[3] *Steele* v. *Louisville & National R.R.*, 323 U.S. 192, 65 S.Ct. 226 (1944), 89 L.Ed. 173; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct., 1022 (1952), 96 L.E. 1283; *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), 2 L.Ed.2d 80; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235 (1944), 89 L.Ed. 187; *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 70 S.Ct. 14 (1949), 94 L.Ed. 22.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

J. GORDON FORESTER, JR.
WALTER J. SMITH, JR.
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1608

W. PETER CAREY, ET AL., APPELLANTS

v.

J. J. O'DONNELL, (PRESIDENT OF AIR LINE PILOTS ASSOCIATION), ET AL.

No. 73-1783

GEORGE S. CHAUDOIN, ET AL., APPELLANTS

v.

AIR LINE PILOTS ASSOCIATION, ET AL.

Appeals from the United States District Court for the District of Columbia

---

Argued 18 April 1974

Decided 19 August 1974

J. Gordon Forester, Jr., with whom *Robert S. Perkins* and *Walter J. Smith, Jr.* were on the brief, for appellants.

Gary Green, for appellees J. J. O'Donnell and Air Line Pilots Association.

Frank F. Rox, with whom *Robert Reed Gray* was on the brief, for appellee Delta Air Lines, Inc.

Before: EDWARDS,* *United States Circuit Judge* for the Sixth Circuit, TAMM and WILKEY, *Circuit Judges*

---

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* These consolidated appeals[1] arise out of the merger between Delta Air Lines, Inc., and Northeast Airlines, Inc. approved by the Civil Aeronautics Board 24 April 1972.[2] Before us are appeals from dismissals by the District Court of actions raising various challenges to that order. Central to both appeals is the issue whether the District Court lacks jurisdiction to entertain a collateral attack upon an order of the Board approving an airline merger, subject to labor protective provisions, and upon the Board's refusal to exercise its reserved jurisdiction to set aside an integrated seniority list negotiated by the parties' freely chosen representatives. For reasons more fully explained below, we affirm the District Court.

I. BACKGROUND—THE DISTRICT COURT'S ACTIONS

A. *Carey* v. *O'Donnell*

W. Peter Carey and four other former Northeast Airlines pilots filed the class action below against the Air Line Pilots Association and its president, J. J. O'Donnell, alleging (1) invidious discrimination, (2) breach of duty of fair representation in the negotiation of a collective bargaining agreement, and (3) violations of the Railway Labor Act ("the RLA").[3] Plaintiffs sought declaratory and injunctive relief against the enforcement by the defendants of the agreement of 26 October 1972, wherein

---

[1] These appeals were consolidated by this court's order of 1 August 1973.

[2] Orders Nos. 72-5-73 and 72-5-74, Docket 23315. Reference is made to our opinion in the companion case, *Northeast Master Executive Council* v. *CAB*, 73-1595, for a more comprehensive background statement of the litigation which followed the Board's order.

[3] 45 U.S.C. § 151 *et seq.*

ALPA and Delta incorporated the integrated seniority list complained of.[4]

Pursuant to FED. R. CIV. P. 12(b)(1) and (6), defendants moved to dismiss the complaint on the grounds that

> "(a) The Court lacks jurisdiction over the subject matter of the action; and
>
> "(b) The Complaint is barred by a prior judgment; and
>
> "(c) The Complaint fails to state a claim upon which relief can be granted."[5]

Alternatively, defendants moved for summary judgment "on the basis of the Complaint, and the affidavit and exhibits attached to [the] motion."[6]

The District Court dismissed the complaint on the authority of *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA*,[7] and *Hyland* v. *United Air Lines, Inc.*,[8] holding that "exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board . . . ."[9] Plaintiffs' motion for reconsideration was denied.

B. *Chaudoin* v. *ALPA*

George S. Chaudoin and three other former Northeast Airlines pilots filed the class action below against the Air

---

[4] The pilots also sought "[d]amages against the Air Line Pilots Association for its refusal to represent the plaintiffs and the destruction of their rights as flight deck crew members in the amount of Seventy-Five Million Dollars ($75,000,000.00)." *Carey* Joint Appendix [hereafter App.] at 8.

[5] *Carey* App. at 9.

[6] *Carey* App. at 10.

[7] Civil No. 1911-72 (D.D.C., 4 October 1972).

[8] 254 F. Supp. 367 (N.D. Ill. 1966).

[9] *Carey* App. at 88.

Line Pilots Association and Delta Air Lines, Inc., alleging violations of the Age Discrimination in Employment Act of 1967 ("the ADEA").[10] Plaintiffs sought a declaration that the agreement of 26 October 1972 incorporating the integrated seniority list was in violation of the ADEA.[11] Asserting the same grounds as in *Carey*, and that "the complaint is a collateral attack on an order of an Administrative Agency, the Civil Aeronautics Board, and it [*sic*] not permitted under the law,"[12] defendants moved for dismissal of the complaint or in the alternative for summary judgment.

The District Court found that while the membership in the class below was somewhat smaller than that alleged in *Carey*, all members of the *Chaudoin* class were also members of the *Carey* class. The court also found that while the action in *Carey* was based on unfairness under the RLA and the action in *Chaudoin* on illegal age discrimination under the ADEA, each complaint questioned the validity of the integrated seniority list and therefore raised the same substantive issues. Accordingly, the court held that between plaintiffs and the defendant ALPA, the decision in *Carey* was *res judicata*. Between plaintiffs and the defendant Delta, the doctrine of collateral estoppel applied.[13] The instant appeal is from those holdings.

II. Exclusive Jurisdiction of the Board and the Courts of Appeals

Today in *Northeast Master Executive Council* v. *CAB*,[14] we affirm the Board's refusal to set aside the integrated

---

[10] 29 U.S.C. § 621 *et seq.*

[11] Plaintiffs also sought liquidated and punitive damages "in such amounts as the Court may determine." *Chaudoin* App. at 6.

[12] *Chaudoin* App. at 11.

[13] *Chaudoin* App. at 255.

[14] No. 73-1595.

seniority list and its holding that the list had been compiled in a "fair and equitable manner." Our jurisdiction to review such orders derives from the Federal Aviation Act of 1958,[15] which provides that orders of the Board "shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia," [16] and that "the court shall have *exclusive jurisdiction* to affirm, modify, or set aside the order complained of . . . ." [17] Congress having thus provided a statutory scheme whereby matters of airline merger, including the fair and equitable integration of seniority lists, are vested in the Civil Aeronautics Board subject *only* to review in the courts of appeals, collateral attacks thereon are impermissible.[18]

Appellants in the cases at bar have all had their day in court as contemplated by the statute.[19] Viewed objectively, the actions below, although couched in terms of violations of the RLA and the ADEA, are essentially collateral

---

[15] 49 U.S.C. § 1301 *et seq.*

[16] 49 U.S.C. § 1486(a).

[17] 49 U.S.C. § 1486(d) (emphasis added).

[18] *See City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958) (exclusive jurisdiction of courts of appeals to review decisions of the Federal Power Commission precludes collateral attack. While the court of appeals decision had already become final in *Tacoma*, the Court's language as to exclusivity would seem to apply whether appellate review had already been instituted or not. The petition to the Board to exercise its reserved jurisdiction, on which our review in *Northeast Master Executive Council* is based, was prior to the District Court actions in *Carey* and *Chaudoin*, although the petition to our court for review came a month after the District Court actions were begun.)

[19] The plaintiff class in *Carey* is congruent with those Northeast personnel represented by the petitioner in *Northeast Master Executive Council*. The smaller plaintiff class in *Chaudoin* is composed of Northeast personnel, all of whom were members of the larger *Carey* class.

attacks on the integrated seniority list as incorporated in the ALPA-Delta agreement of 26 October 1972, approved by the Civil Aeronautics Board, and reviewed by this court in *Northeast Master Executive Council.* We perceive no necessity for additional review, not contemplated by the Federal Aviation Act, in the District Court or any other forum.

The Seventh Circuit in *Oling* v. *Air Line Pilots Ass'n*[20] rejected the claim, brought by pilots aggrieved by the merger of Capital and United Air Lines, that the District Court had jurisdiction over a suit charging discrimination and other violations under the RLA. Like the case at bar, *Oling* involved "a situation where the Board acting within its jurisdiction and authority gave its approval to the merger upon condition that certain labor protective provisions be complied with including that pertaining to seniority integration . . . ."[21] The court held that the allegations made in the District Court were essentially the same as those made before the Board, and as such constituted an impermissible collateral attack on the Board's order.

Appellants over rely on the Board's statement in *Universal Airlines Company*[22] that it lacks jurisdiction over controversies of the type presented in these appeals, implying that the aggrieved pilots in that case had remedies available elsewhere. But when the Universal pilots' action in District Court—based on a claim of breach of duty of fair representation—was dismissed for lack of subject matter jurisdiction, the Sixth Circuit in *Kesinger* v. *Universal Airlines, Inc.*,[23] affirmed, citing *Oling*, and noting

---

[20] 346 F.2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1965).

[21] 346 F.2d at 275.

[22] *Universal Airlines Company, Universal Airlines, Inc., First Grant Corp. and American Flyers Airline Corp.*, Order No. 71-9-24, Docket 22123.

[23] 474 F.2d 1127 (6th Cir. 1973).

that "the CAB is not the final word concerning its own jurisdiction . . . and certainly not the final word concerning the jurisdiction of United States district courts." [24]

We follow the result reached in *Oling* and *Kesinger*. Our decision in *Southern Pilots Association* v. *CAB* [25] is not to the contrary. We said there that the Civil Aeronautics Board "has no jurisdiction to pass upon designations of bargaining agents or charges of discrimination in the representation function." [26] Yet that case, which involved an ordinary unfair representation claim based solely upon principles of labor law, did not arise in the context of an airline merger and subsequent compilation of an integrated seniority list. Consequently, we had no occasion in *Southern Pilots* to consider whether the Board does have jurisdiction over certain labor matters arising out of its approval of an airline merger on conditions involving the fair and equitable negotiated settlement of those labor matters.

III. Other Issues

Since we adopt the rationale of the Sixth and Seventh Circuits and hold as we do that the District Court has no jurisdiction over the actions below, we need not reach the questions of *res judicata* and collateral estoppel presented in *Chaudoin*. While it may have found other valid grounds on which to dismiss, the District Court had no more jurisdiction to hear that action that it had to hear *Carey*.

Accordingly, the judgments appealed from are

Affirmed.

Circuit Judge Edwards concurs in the result in Nos. 73-1608 and 73-1783.

---

[24] 474 F.2d at 1131.

[25] 116 U.S. App. D.C. 283, 323 F.2d 288 (1963), *cert. denied*, 376 U.S. 954 (1964).

[26] 116 U.S. App. D.C. at 285, 323 F.2d at 290 (footnote omitted).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 609-73

ORDER

This cause is before the Court on the motion of the defendant Airline Pilots Association to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) Federal Rules of Civil Procedure.

The defendants urge, and the Court agrees, that exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board, *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA,* C.A. 1911-72 (D.C.D.C.); *Hyland* v. *United Airlines,* 254 F.Supp. 367 (N.D. Ill. 1966). Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be granted and it is this 1st day of May, 1973 so ORDERED.

.....
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 752-73

MEMORANDUM AND ORDER

I

Plaintiffs are flight deck crew members, 40 years of age or older, who are presently employed by Delta Airlines (hereinafter Delta). All are members of the Airline Pilots Association (ALPA) the designated bargaining agent for Delta flight deck crew personnel under the Railway Labor Act (hereinafter Northeast) before its merger with Delta on August 1, 1972. ALPA was also bargaining agent for plaintiffs while they were in the employ of Northeast prior to August 1, 1972.

Among the complex negotiations surrounding the Delta-Northeast merger were those within ALPA to prepare an integrated seniority list for the personnel of both airlines for use in ALPA dealings with Delta after the merger was concluded. This integrated list agreement was prepared on June 1, 1972.[1] Plaintiffs have concluded that it redounds to their disadvantage and have initiated several suits, including the instant case, which challenge its validity. The thrust of the present complaint is that the list, insofar as it affects flight personnel 40 years of age or older, violates the Age Discrimination in Employment Act, (ADEA) 29 U.S.C. Sec. 623.

Defendants Delta and ALPA have moved that this action be dismissed pursuant to Rule 12(b) FRCP. In the alternative defendants have moved for summary judgment.

---

[1] The list was accepted by Delta on July 18, 1972.

After careful consideration of the memoranda filed by the parties, the Court concludes that defendants' motions to dismiss must be granted.

II

As noted above, plaintiffs have sought judicial and administrative relief from the provisions of the integrated seniority list in a number of forums.

On September 25, 1972 the former Northeast pilots, including plaintiffs, filed a complaint in this Court (*Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA,* Civil Action No. 1911-72) seeking to enjoin ALPA from executing the agreement with Delta that incorporated the integrated seniority list. On October 4, 1972 the District Court (Jones, J.) granted the defendant ALPA's motion for summary judgment on the grounds that the exclusive jurisdiction over the dispute was vested in the Civil Aeronautics Board (CAB).

Meanwhile on October 3, 1972 the Northeast group had also petitioned the CAB to exercise its reserved jurisdiction and to issue an order requiring that the integrated seniority list be submitted to arbitration. On January 10, 1973, the CAB denied that request.

Thereafter on March 29, 1973 the Northeast group filed another complaint in this Court, *Carey* v. *O'Donnell,* Civil Action No. 609-73, alleging that ALPA had failed to represent them fairly and impartially in executing a labor contract with Delta which embodies the integrated seniority list. The *Carey* complaint was brought as a class action on behalf of all former Northeast flight deck crew members then employed by Delta, approximately 540 persons.[2]

---

[2] The present class includes only 240 members, presumably all members of the Northeast group over 40 years of age. The ADEA restricts standing to sue under the act to persons over 40.

On May 16, 1973 this Court entered an order dismissing the *Carey* action on grounds that exclusive jurisdiction was vested in the CAB.[3]

In the meantime the plaintiffs instituted this action on April 19, 1973.

III

The Court finds that while the membership of the alleged class in the instant case is somewhat smaller than that before the Court in *Carey,* all members here were members of that plaintiff class as well. The Court also finds that while the defect alleged in *Carey* (*i.e.* unfairness under the Railway Labor Act) is different that the one considered now (*i.e.*, illegal age discrimination under the ADEA) each complaint goes to exactly the same question the validity of the integrated seniority list.

The Court never reached the merits of plaintiffs' claim in *Carey* because it held that exclusive jurisdiction over the question of the seniority list was vested in the CAB. As between the 240 crew members involved in this suit who were also members of the *Carey* class and the ALPA which was also before the Court in *Carey,* that May 16th opinion and order is *res judicata.*

As between the plaintiff class and Delta, *res judicta* is inapplicable since there is no identity of parties. However, the doctrine of collateral estoppel is applicable. While the rule laid down in the recent case of *Stebbins* v. *Keystone Insurance Co.* .... F.2d .... (D.C.C.A. June 5, 1973) limits the vitality of the doctrine in the situation where a dismissal by a court of first instance is based on determination of two issues, either of which standing alone would be sufficient to support the result, that rule has no applicabil-

[3] Plaintiffs appealed this decision to the U.S. Court of Appeals for the District of Columbia on May 31, 1973. The appeal is still pending.

ity here. The Court's May 16th order in *Carey* was based solely on the conclusion that exclusive jurisdiction over the issues raised in connection with the seniority list lay with the CAB. See *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA, supra;* and *Hyland* v. *United Airlines,* 254 F.Supp. 367 (N.D.Ill. 1966). That conclusion remains binding on plaintiffs here.[4]

Accordingly the plaintiffs are barred by the doctrine of collateral estoppel from relitigating the issue of jurisdiction once again in this Court notwithstanding the assertion of a different statutory basis.

It is therefore this 15th day of June, 1973

ORDERED that the defendants' motion to dismiss be granted.

Signatures illegible

Counsel

J. Gordon Forester, Jr., Esq.
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Plaintiff

Gary Green, Esq.
Legal Department
Air Line Pilots Association, International
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Defendant ALPA

Hale Russell & Stentzel
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

---

[4] The CAB has undoubted power to oversee the integration of employee seniority lists as part of its jurisdiction over airline mergers. Outland v. C.A.B., 284 F.2d 224 (D.C.C.A. 1960) Burger, Jr., 49 U.S.C. Sec. 1378.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

Hugh E. Kline
Clerk

November 1, 1974

Nos. 73-1595—Northeast Master Executive Council v. CAB
73-1608—W. Peter Carey, et al. v. J. J. O'Donnell
73-1783—Chaudoin v. Air Line Pilots Ass'n

J. Gordon Forester, Jr., Esq.
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Dear Mr. Forester:

This is to inform you that your suggestions for rehearing *en banc* in the above cases were transmitted to the full Court, and there not being a majority of the Circuit Judges of this Court in favor of having a rehearing *en banc,* it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

HEK/bjg

CC: Gary Green, Esq.
Robert Reed Gray, Esq.
Robert L. Toomey, Esq.
Howard E. Shapiro, Esq.
James W. Callison, Esq.

APPENDIX E

Railway Labor Act, 45 U.S.C. 151, § 156.

Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

May 20, 1926, c.347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Railway Labor Act, 45 U.S.C. 151, § 152 Seventh.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Age Discrimination in Employment Act, 29 U.S.C. 621, 623.

§ 623. Prohibition of age discrimination—Employer practices.

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

§ 626

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

28 U.S.C. 1337

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c.646, 62 Stat. 931.